IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-86

UNITED STATES OF AMERICA,
Petitioner,

vs.

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. AND THE NATIONAL SHERIFFS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Solicitor General of the United States, counsel for the Petitioner, and by Mr. Thomas R. Smith, Esq., counsel for the Respondents. Letters of consent of both parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the state of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The International Association of Chiefs of Police, Inc. (IACP) represents over 5,000 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct. With regard to police professionalism law-related activities, the IACP, in 1970 formed the Police Legal Center of the IACP. This center serves as a hub for legal activities affecting police work, it coordinates the activities of Police

Legal Advisors and Police Legal Units, nationwide, and publishes numerous periodicals, documents, and in-service legal training materials for use both by police officers and executives.

The National Sheriffs' Association is a non-profit, professional organization with nearly 35 years of progressive assistance to federal, state, and local law enforcement, court, corrections, and other criminal justice agencies. Its more than 33,000 members in all states and several foreign nations include not only the 3099 sheriffs of America but also encompass other criminal justice administrators and practitioners at virtually every level of jurisdiction.

The NSA conducts, frequently in conjunction with colleges and universities, scores of educational, training, and informative conferences, seminars, and courses each year. The Association has conducted nationwide crime prevention programs and has worked with state and local governments in promulgating mutual aid concepts and contracts for more effective enforcement of the laws.

The interest of *amici* in the instant case stems from the importance of the issues involved, the resolution of which will have a direct and material impact upon the effectiveness of law enforcement. The question directly at issue—whether or not police officers must procure a search warrant to remove the clothes of a lawfully incarcerated suspect some hours after his incarceration—raises important legal and practical problems for police officers nationwide. *Amici* believe however that there is an overriding policy issue here: the question of what standards this Court will mandate for lower courts in their determination of search and seizure cases involving law enforcement officers. This is the issue to which *amici* will address ourselves and wherein our interest lies.

ARGUMENT.

I.

THE LOWER COURT'S DECISION IS AN UNREALISTIC AND HYPERTECHNICAL RESTRICTION UPON PROPER POLICE CONDUCT AND SHOULD BE REVERSED.

As is our custom when appearing as *amici* before this Court, we will not reiterate at any length the legal arguments made by the Government in this case, although we are in complete agreement with such arguments and wish to associate ourselves with and express our complete support for them. *Amici* will, rather, address ourselves to the important policy issues raised by this case and to the importance of such issues to the effectiveness of law enforcement, nationwide.

A.

This Court Does Now, and Should Continue To, Set for Lower Courts a Judicial Tenor of Commonsense and Realistic Interpretation of Police Conduct in the Enforcement of the Criminal Law.

Any case which this Court hears is, by definition, an important one because, at least in issues of Constitutional dimension, every lower court in the country is, of course, bound by the rulings of this Court. There is a broader area of importance associated with cases such as this, however, because, in addition to making definitive and controlling rulings on a case-by-case basis, this Court sets a *tenor of jurisprudence* for lower courts which transcends its holdings in individual decisions.

In no area is this tenor more important than that involving the conduct of the police in the enforcement of the criminal law. Just as lower courts are bound by the Court's holdings, the 400,000 plus law enforcement officers, who are responsible to

the lower courts, are intimately affected not only by this Court's holdings in individual cases, but by the *overall* impact of those holdings as they are viewed by the lower courts.

There are basically two ways in which courts can interpret police actions: either in a hypertechnical and unrealistic manner in which the slightest judgment error by an officer in such an incredibly complicated area as search and seizure law will be held cause for the suppression of evidence and the reversal of a conviction; or, in a common-sense manner in which the realities of law enforcement work are taken into consideration and the bases of review of police conduct are ". . . the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U. S. 160, 175 (1949).

This Court has, in recent years, followed the latter approach, setting a tenor of commonsense and realistic review of police conduct for lower courts. In *United States* v. *Harris*, 403 U. S. 573 (1971), the Court upheld an affidavit for search warrant, which the lower court had found insufficient by applying what the Chief Justice, writing for the majority, characterized as ". . . the very sort of hypertechnicality—the elaborate specificity once exacted under common law—condemned by this Court in *Ventresca*," 403 U. S. 573 at 579. Likewise in *Adams, Warden* v. *Williams*, 407 U. S. 143 (1972) this Court reversed the holding of the United States Court of Appeals for the Second Circuit, that information from a known but untested informant was insufficient to justify a *Terry*-type "stop and frisk."

Only last term this Court applied commonsense standards to sustain searches and seizures in three cases: *Cupp* v. *Murphy*, ... U. S. ...., 93 S. Ct. 2000 (1973) (the taking of fingernail scrapings, without a warrant, from a murder suspect who was not then under arrest); *Schneckloth* v. *Bustamonte*, ... U. S. ...., 93 S. Ct. 2041 (1973) (holding that the voluntariness of a consent to search is a fact to be determined from the totality of the circumstances); and *Cady* v. *Dombrowsky*, ...

U. S. . . . ., 96 S. Ct. 2523 (1973) (upholding the warrantless search of an automobile at a time after it has been impounded and placed in a garage).

In each of these cases the lower courts used rather rigid, technical standards to find the police conduct in question illegal, in effect refusing to consider the practicalities of police work. In each case this Court reversed and upheld the searches involved by applying commonsense standards to the law enforcement activities in question without doing damage to the *fundamental* rights guaranteed to every citizen by the Constitution, which rights this Court has been vigilant to protect. This is what we mean by the "tenor of jurisprudence" which is set by this Court for lower courts, and which we consider to be as important as the holdings in the individual cases.

B.

The Instant Case Calls for the Same Application of the Commonsense and Realistic Standards Which This Court Has in the Past Enunciated.

This commonsense approach—this balancing of the rights of society against those of the criminal accused—is, we believe, called for in the instant case. In our view, the lower court in this case applied hypertechnical standards in the extreme by holding illegal the taking, for scientific examination, of the clothes of a suspect who had lawfully been incarcerated, some ten hours after his incarceration. We believe that the commonsense and realistic evaluation taken by this Court in the cases cited above should be applied to the instant case, both as to the facts of the case itself and to continue the tenor of such an approach to police conduct which this Court has evidenced in recent years.

We should state at the outset that we believe that the gravity of the instant case transcends the crime involved therein: a post office burglary. While burglary is, without question, a serious

crime, the issue raised, the search of the person of one lawfully incarcerated, will often arise in more serious crimes such as murder and rape; for it is precisely the sort of minute physical evidence—hairs; fingernail scrapings; blood, saliva and semen stains; traces of dust and earth; etc. which will be involved in violent crimes against persons.[1] Additionally, we point out that this Court's restrictions upon the police in obtaining legally admissible confessions from criminal suspects have made the use of scientific evidence extremely important in the solution and successful prosecution of criminal cases.[2]

We turn now to the characterization of the lower court that the police conduct in the instant case was "unreasonable." Surely it is patent that there was no egregious or wilful misconduct on the part of the police. They were made aware of a break-in at the Lebanon, Ohio Post Office late on a Sunday night and lawfully arrested the suspects, respondents herein, shortly thereafter. Photographs were taken of the site of the break-in that night, after the break-in was discovered, and then the officers apparently went home to bed, planning to continue their investigation in the morning. This they did. The next morning paint scrapings were taken from the scene of the break-in and sent to the laboratory for analysis. The police also purchased new clothes for the suspects and took, without a warrant, the suspects' original clothing for laboratory analysis to determine if there were paint samples on the clothes which could be matched to those taken at the scene. (Trial Transcript, page 343) The record indicates that the officers acted in complete good faith.

Clearly this is not the sort of case where the police should have been aware that their actions in taking, without a warrant, the clothes of the incarcerated prisoners would be held to be "unlaw-

1. cf. *Cupp* v. *Murphy*, (*supra*). See generally: "Scientific Evidence in Criminal Cases" by Moenssens, Moses, and Inbau, Foundation Press, 1973.

2. *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Orozco* v. *Texas*, 394 U. S. 324 (1969).

ful." At least two United States Circuit Courts of Appeal had previously sanctioned such conduct: the Second Circuit in *United States* v. *Caruso*, 385 F. 2d 184, (1966) and the Fifth Circuit in *United States* v. *Williams*, 416 F. 2d 4, (1969). It is highly unlikely that the Lebanon, Ohio police officers had heard of either case at the time that they took respondent's clothing, but the fact that *Caruso* and *Williams* had been decided indicates beyond any doubt that the searches involved were not encompassed by an area of the law so settled that the officers would be chargeable with knowledge of the "illegality" of their acts.

Additional evidence that the police were acting in good faith may be found in the fact that, on the morning after the break-in, they procured a search warrant for the automobile in which one of the suspects was arrested the prior evening. (Transcript of Motion To Suppress at pages 101, 155-157, 161-162) Had the officers had any idea that a search warrant was necessary for the seizure of the clothing from the prisoners in jail, they could have easily procured one. This case appears to us to be a clear example of police officers who were making every attempt to comply with the law but who were "second guessed" by the hypertechnical interpretation placed upon their conduct by the lower court.

Thus, it is apparent that the officers' conduct in the instant case was neither (a) egregious or wilful; nor (b) the sort of conduct which they should have *known* was clearly prohibited, as would have been the case if they had arrested the respondents on bare suspicion, locked them up and taken their clothes. The question remains, then, was their conduct, despite this lack of knowledge, as "unreasonable" as the lower court held it to be?

We believe not. The respondents had already been arrested and were lawfully in jail. The invasion of their privacy was already about as complete as it could be and we do not see how the taking of their clothes without a warrant some hours after

their incarceration can be held to be an invasion of a Constitutionally protected right.[3]

The situation here is basically analogous to the theory used by this Court to sustain the warrantless search of an automobile, at the police station to which it had been transported, some hours after it had been stopped and its occupants arrested, *Chambers* v. *Maroney*, 399 U. S. 42, (1970). Mr. Justice White, writing for the majority of the Court in *Chambers*, found that the police had probable cause to search the car when it was stopped on the road and its occupants were arrested. He then found the later, warrantless search at the police station proper because:

> For constitutional purposes we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. 399 U. S. at 52.

In the instant case the primary invasion of respondents' privacy—their being lawfully taken into custody—had already taken place. Like the automobile in *Chambers*, they had been seized, with probable cause, and a complete search of their persons at the time of their arrest, including the taking of his clothes, would have been lawful at that time. By analogy to *Chambers*, the subsequent taking of their clothes, probable cause still existing, should be equally lawful.

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3. This is not to say that there could not be cases in which an incarcerated person would have a right to court process before physical evidence was taken from him. Invasions of the body, for instance the probing for a bullet believed to have been fired into the suspect, might well have to be done only upon court order; but here the only removal was of respondents' outer clothing.

C.

A Significant Distinction Exists Between the Fourth Amendment Rights of Persons at Liberty and of Persons Lawfully Incarcerated.

This is the point at which the analogy between the automobile in the case of *Chambers* v. *Maroney* (supra) and persons of the suspects in the instant case brings into focus the "hypertechnical and unrealistic" vs. the "commonsense and realistic" dichotomy involved in interpreting the reasonableness of police conduct. There appears to be no doubt that, had the police taken respondents' clothing at the time of their arrest and booking, there would be no question of the lawfulness of the taking. (*United States* v. *Manar*, 454 F. 2d 342, CA7, (1972) and cases cited therein). If the right to take the clothing without a warrant of the suspects, who were already in jail, existed at one point in time, we believe that only the most tortured and technical interpretation of the Fourth Amendment's protection would lead to the conclusion that the *same clothes* could not be taken from the *same suspects, who were still in jail* on the original charge which lodged them there.

The analogy between the search of a vehicle and of a person can be carried one step farther at this point. This Court has always held that the rules governing the search of automobiles are far more flexible in cases dealing with automobiles than in cases dealing with searches of dwellings. *Carroll* v. *United States*, 267 U. S. 132 (1925). This is so because vehicles, because of their moveable nature, make much easier the disposition or removal of evidence.

We submit that evidence of a physical nature concealed, whether knowingly or unknowingly, on the person of a suspect is far more capable of easy disposal than that contained in a moveable vehicle. A vehicle at least requires someone to drive it away and there are many places to which a person can go that a vehicle can not. In the instant case it is true that re-

spondents were locked in a jail cell, but, had it occurred to them, they could have shaken their clothing out, soaked them in a toilet or even obtained matches for the ostensible purpose of smoking cigarettes and burned the clothes in order to remove any physical evidence against them.[4] In short, viewed realistically, the mere presence of physical evidence of a crime on the person of a suspect creates in many cases an exigency similar to, if not greater than, that used to justify warrantless searches of vehicles.

Clearly, had the respondents been released on bond and left the jail, the police would then have needed a search warrant to take the clothes from the suspects either in person or from their dwelling. But this is simply not the case here. Respondents *were* still in jail and the lower court's requirement of a warrant to take their clothes erects a constitutional barrier around persons lawfully incarcerated which has not been sanctioned by this Court before. (See, e.g. *Lanza* v. *New York*, 370 U. S. 139 (1962), ". . . a jail shares none of the attributes of privacy of a home, an automobile, an office or a hotel room", 370 U. S. 139 at 143.)

The United States Court of Appeals for the Ninth Circuit in two recent cases, has held that there is no Fourth Amendment

4. This is the sort of exigency which we believe distinguishes the instant case from the holding of this Court in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971). In *Coolidge* the warrantless search of the defendant's car, parked at his house, was held to be unlawful; however, in that case Coolidge was in jail, his wife was miles away in the company of police officers and the Coolidge property was under guard, thus for all intents and purposes the vehicle was immobilized. In the instant case the evidence was *on the persons* of respondents and, despite the fact that they were in a jail cell, the evidence was readily available to them for disposal had one of them suddenly remembered the fact that scientific investigation techniques such as the examination and analysis of paint samples had been used by the police in past cases. The exigency, at least in the minds of the police, which is raised by these facts becomes even more important when it is considered that the police did not decide to take paint scrapings from the crime scene until the morning after the arrests were made; they then seized the suspects' clothing the same morning.

bar to the warrantless search of the cell of someone lawfully incarcerated; *United States* v. *Hitchcock*, 467 F. 2d 1107 (1972), cert. den. 410 U. S. 916; *United States* v. *Palmateer*, 469 F. 2d 273 (1972). In *Hitchcock* the court held specifically that a prisoner has no reasonable expectation of privacy in his cell, 467 F. 2d 1108. We believe that the same commonsense rationale should apply to the taking of the suspects' clothing in the instant case.

As we have noted, the argument can be made that the mere presence of disposable evidence on the person of respondents created an exigency which, analogous to the case of automobiles, would permit the warrantless taking of their clothes. Even assuming that no such exigency existed, the minimal invasion involved in taking respondents' clothes when they were lawfully incarcerated in the first place and had no reasonable expectation of privacy in their cell (see, *U. S.* v. *Hitchcock*, *supra*), can not, by any realistic and commonsense standard, be held to be a constitutional violation warranting a reversal of their convictions.

D.

The Decision of the Lower Court, If Upheld, Will Create Significant and Unnecessary Practical Problems for the Police.

The lower court's unrealistic holding in the instant case could, if taken to its logical conclusion, cause innumerable practical problems for law enforcement officers and jailers alike. When, for example, does the mantle of the Fourth Amendment's warrant clause protection fall about the shoulders of the prisoner? When he leaves the booking desk? After he has been in jail for an hour? Two hours Eight hours? Additionally, under the lower court's ruling, must police officers or jailers procure a search warrant every time they wish to search the person or cell of an incarcerated prisoner and no demonstrable exigency exists? These are very real practical problems which, we submit, the lower court ignored and which this Court should consider.

We do not contend for a moment that persons in jail or prisons should have no rights at all. Obviously they should be protected from beatings and other inhumane treatment, from "third degree" methods of questioning and even from completely arbitrary searches of their persons or living areas when such searches are made solely for harassment purposes. But where, as in the instant case, the police have criminal suspects incarcerated in lawful custody and where there is probable cause to believe that their clothes contain evidence of the crime for which they were arrested, we believe that the warrant requirement imposed by the lower court in this case constitutes a hypertechnical restriction upon legitimate police conduct (and which would in this case in all likelihood require the freeing of two convicted burglars) which adds nothing to the fundamental freedom from truly unlawful search and seizure which is embodied in the Fourth Amendment.

We urge the Court to reverse in this case and to continue its judicial tenor of reasonable and commonsense standards of interpretation of police conduct.

CONLUSION.

The efforts of law enforcement officers nationwide to deal with the problems of crime and lawlessness are, quite properly, under constant scrutiny by lower courts across the nation. This scrutiny takes place in a tenor of jurisprudence set for the lower courts by this Court. This tenor has of late been towards a commonsense and realistic approach to the interpretation of police conduct. The instant case provides a vehicle to continue this trend. The lower court applied a technical and unrealistic interpretation to the actions of the police officers when it held that a search warrant was required to take the clothes for scientific examination, of two lawfully incarcerated suspects some hours after their incarceration. We do not believe that, in a case such as this, such an interpretation was constitutionally warranted and we urge this Court to reverse.

Respectfully submitted,

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